IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA

Petitioner,

v.

Case No. SC16-2186
DCA Case No. 5D14-492

KELLY MATHIS,

Respondent.

ON PETITION FOR DISCRETIONARY REVIEW OF THE DECISION OF THE FIFTH DISTRICT COURT OF APPEAL

BRIEF OF PETITIONER ON JURISDICTION

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STATEMENT OF THE CASE AND FACTS

This is an appeal from the Fifth District Court of Appeal's reversal of Respondent's convictions of fifty-one (51) counts of Conducting or Promoting An Illegal Lottery in violation of Section 849.09(1), Florida Statutes, fifty-one (51) counts of the Manufacture, Sale, Possession, etc., of Slot Machine or Devices in violation of Section 849.15, Florida Statutes (2013), and RICO in violation of Section 895.03, Florida Statutes. In reaching its decision to reverse Respondent's one hundred and three (103) convictions, the court held the language of Section 895.03, Florida Statutes, while not requiring specific intent, does not express the Legislature's intent to dispense with a mens rea requirement; therefore, the court interposed a mens rea element in the otherwise clear language of Section 895.03, Florida Statutes; RICO. The Fifth District's opinion now requires a finding of specific intent to violate Section 895.03, Florida Statutes, without consideration of the underlying predicate acts.

It is further expressly noted that the appellate court did not address any basis for the reversal of the independently charged substantive crimes of Manufacture, Sale, Possession, etc., of Slot Machines or Devises; Counts 3-53, nor Conducting or Promoting An Illegal Lottery; Counts 54-104 of the State's Second Amended

Information. Consequently, the overturning of these one hundred and two (102) convictions for independent substantively charged crimes is tantamount to a silent *per curiam reversal* of those counts.

Respondent was a licensed Jacksonville attorney who was initially hired by individuals who wanted to open and operate internet cafes in the State of Florida. Respondent also spoke to state and local officials regarding the legality of operating internet cafes in conjunction with certain gaming promotions he touted as "sweepstakes." However, between 2007 and 2014, Respondent took on a more expanded and involved role in the operation of the individual internet cafes across the State. Respondent and the owners of the internet cafes eventually became involved with an established veteran's organization known as Allied Veterans of the World ("Allied Veterans"); the internet cafes were operated as a veteran's non-profit organization under section 501(c)(19) of the Internal Revenue Code. By 2011 there were fifty (50) "affiliate" locations throughout Florida. (Slip Opinion, pg. 2, *1)

At trial Respondent sought to introduce evidence that he had conferred with different state and local authorities who agreed with his analysis of the "sweepstakes promotion" and its legality in conjunction with the sale of "internet time." The purpose of this evidence was to show he had no intent to violate the RICO law; challenging the "knowledge element of the offense." (Slip Opinion,

pg. 5, *5) Respondent maintained the "sweepstakes gaming" activities of Allied Veterans were legal. The trial court granted the State's motion in limine to exclude testimony from individuals that Respondent met with regarding their legal opinion as to the legality of the "sweepstakes gaming promotion" run by Allied Veterans. (Slip Opinion, pg. 3, *2)

The Fifth District Court of Appeal reversed ***all*** Respondent's convictions holding the trial court abused its discretion because:

> By preventing Appellant from introducing this evidence, the trial court effectively ***transformed the racketeering charge into a strict liability offense***. Appellant's argument that he lacked the ***mens rea necessary to commit racketeering*** amounts to a valid theory of defense, and the trial court abused its discretion by excluding the evidence supporting that defense. (Slip Opinion, pg. 5-6, *5).

[Emphasis added].

The Fifth District Court of Appeal used this Court's statements in State v. Giorgetti, 868 So.2d 512 (2004) recognizing limitations upon the Legislature regarding the removal of knowledge as a requirement to find that RICO requires a specific intent on the part of a defendant, separate and apart from the mens rea of the predicate crimes, to support the reversal of the trial court.

SUMMARY OF THE ARGUMENT

This Court has jurisdiction to review the Fifth District Court of Appeal's decision because the Fifth District Court of Appeal's decision directly and expressly conflicts with the correct rule of law as stated by this Court in State v. Giorgetti, 868 So.2d 512 (Fla. 2004); Bowden v. State, 402 So.2d 1173 (Fla. 1981) and the Second District Court of Appeal in Huff v. State, 646 So.2d 742 (Fla. 2nd DCA 1994).

ARGUMENT

THIS COURT HAS JURISDICTION TO REVIEW THE DECISION OF THE FIFTH DISTRICT COURT OF APPEAL BECAUSE THE FIFTH DISTRICT COURT OF APPEAL'S DECISION DIRECTLY AND EXPRESSLY CONFLICTS WITH A DECISION OF THIS COURT AND ANOTHER DISTRICT COURT OF APPEAL WHICH STATE THE CORRECT RULE OF LAW.

As this Court explained in The Florida Star v. B.J.F., 530 So. 2d 286, 288 (Fla. 1988), the state constitution creates two separate concepts regarding this Court's discretionary review. The first concept is the broad general grant of subject-matter jurisdiction. The second more limited concept is a constitutional command as to how this Court may exercise its discretion in accepting jurisdiction. 530 So. 2d at 288.

This Court can exercise its jurisdiction where a district court's opinion "expressly and directly conflicts with the decision of another district court of appeal, or with the supreme court on the same issue of law", Fla. Const. Art. V, 3(b)(3), and the conflict appears on the face of the opinion. Reaves v. State, 485 So. 2d 829, 830 (Fla. 1986). This Court has held the "concern in cases based on our conflict jurisdiction is the precedential effect of those decisions which are incorrect and in conflict with decisions reflecting the correct rule of law. Wainwright v. Taylor, 476 So. 2d 669, 670 (Fla. 1985).

The Fifth District Court of Appeal's decision in this case conflicts with this Court's decisions in Giorgetti and Bowden, as well as the decision of the Second District Court of Appeal in Huff because each of these cases recognized the correct rule of law that the Legislature has the power to eliminate scienter requirements from a statute with three specific restrictions, those being:

> (1) statutes that codify common law *mala in se* or "infamous" crimes where intent is considered to be so ***inherent in the concept of the common law offense*** that it was deemed included as an element; (2) statutes that would tend to ***chill*** the exercise of ***First Amendment rights*** if intent were not required; and (3) statutes that ***impose an affirmative duty to act*** on an individual, and then penalize the failure to act.

Giorgetti, 868 So.2d at 516-517. RICO was not a common law crime; thus, the first stated restriction does not apply. RICO does not impose an affirmative duty to act; thus, the third stated restriction does not apply. And, lastly, the second stated restriction based upon a chilling effect upon First Amendment rights does not apply because, as this Court found in Bowden, the criminal activity defined in Section 895.03, Florida Statutes, is not innocent behavior protected by the First Amendment.

In Bowden this Court found that RICO does not impose strict liability or predicate sanctions on presumptively protected activities. This Court further held in Bowden that the predicate acts control the mens rea element of the crime of RICO; stating

"[o]nly after this 'predicate crime' has been established, can the state proceed to the proof of the RICO Act violation." 402 So.2d at 1174-1175.

Here, the fact that Respondent was charged with RICO, a general intent crime which requires the State to prove the individual elements of the underlying alleged predicate acts as regards mental intent does not require an additional layer of proof of specific intent that an act of RICO be committed. Such a finding is also in direct conflict with the Second District Court of Appeal's decision in Huff which held that a RICO conviction predicated upon both strict liability crimes and specific intent crimes would survive the dismissal of all specific intent crimes and be affirmed upon reliance of the convictions for the underlying strict liability crimes alone. Huff, 648 So.2d at 744.

In Huff the defendant was charged with RICO violations predicated by multiple crimes; some requiring specific intent, some requiring general intent and still others deemed to be strict liability crimes; such as, security law violations. Huff sought to introduce evidence that he relied upon the advice of counsel when acting in violation of the law. The district court found that those underlying predicate acts which required specific intent should be overturned because the trial court abused its discretion by prohibiting him to present his defense of lack of intent as to those

crimes. However, affirming the RICO conviction, the court went on to find, as regarded those crimes of general intent or strict liability, where no specific intent is required, the trial court did not err and those convictions alone upheld the RICO conviction which they predicated.

The Fifth District's opinion directly conflicts with this holding of the Second District Court of Appeal. Contrary to the finding of the Second District, the Fifth District's opinion finds that the Legislature, although silent, ***intended*** to require mens rea for the crime of RICO under Section 895.03, Florida Statutes.

The Fifth District Court of Appeal's decision to the contrary is in direct and express conflict with the correct statement of the law as expressed by this Court in Bowen; Giorgetti and the Second District Court of Appeal in Huff. Consequently, this Court has jurisdiction to review the Fifth District Court of Appeal's decision.

Lastly, Petitioner calls this Court's attention to the fact that while opining about Respondent's conviction under the charge of RICO, expressly Section 895.03, Florida Statutes, the court failed to articulate any basis for overturning Respondent's one hundred and two (102) convictions for independently charged substantive crimes under Sections 849.09(1) and 849.15, Florida Statutes; Counts 3-104 of the State's Second Amended Information. Although this Court has no absolute rule requiring an appellate court to write an opinion,

this Court has stated that:

> 'It has long been the custom and practice in this court to write an opinion where the judgment being reviewed is reversed * * *.' This is indeed logical because, to reverse a lower court and remand the cause for further proceedings without some indication of the error committed or the manner in which the reviewing court expects the cause to proceed in the lower court, would leave the court under review in doubt and confusion as to what error had been committed and what corrections were expected in the future course of the case.

Rosenthal v. Scott, 131 So.2d 480, 481-482 (Fla. 1961). District Courts of Appeal have also held per curiam reversals are "inappropriate", finding "it is the responsibility of the appellate court to guide the trial courts as to questionable procedures or rulings." Kates v. Millheiser, 569 So.2d 1357 (Fla. 3rd DCA 1990). *See also* City of Kissimmee v. Grice, 669 So.2d 307, 309 (Fla. 5th DCA 1996)(". . . an appellate court has the responsibility to write opinions in all reversals"). As in Rosenthal, the facts presented here also warrant a reasonable request to the appellate court to express its theory and reasoning for overturning one hundred and two (102) convictions so that this Court can more readily perform its duty regarding the exercise of its discretionary jurisdiction for the purpose of preserving harmony and uniformity among the decisions of the appellate courts of this state. 131 So.2d at 482.

CONCLUSION

Because the Fifth District Court of Appeal's decision in this

case expressly and directly conflicts with the correct rule of law as expressed by this Court and the Second District Court of Appeal, this Court should accept jurisdiction and review the Fifth District Court of Appeal's decision in this matter.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY a true and correct copy of the foregoing Notice to Invoke Jurisdiction of the Florida Supreme Court was electronically filed through the e-file system on this 16th day of December, 2016, and a copy of same has been served by e-mail transmission upon: Attorneys for Respondent, Peter D. Webster, Esq., Carlton Fields Jorden Burt, P.A., P.O. Drawer 190, Tallahassee, Florida 32302 at pwebster@cfjblaw.com; Michael Ufferman, Esq., Michael Ufferman Law Firm, P.A., 2022-1 Raymond Diehl Road, Tallahassee, Florida 32308 at ufferman@ uffermanlaw.com; Counsel for Amicus, National Association of Defense Lawyers, Donald F. Samuel, Esq., Garland, Samuels, Loeb, P.C., 3151 Maple Drive, N.E., Atlanta, Georgia, 30305 at dfs@gsllaw.com; Jenny E. Carroll, Esq., University of Alabama School of Law, Box #870382, Tuscaloosa, Arizona 35487-0382 at jcarroll@law.us.edu; Ashley Litwin, Esq., Law Office of Marc David Seitles, 40 N.W. 3rd Street, PH 1, Miami, Florida 33128-1838 at Alitwin@seitleslaw.com, and Marc J. Randazza, Esq., Randazza Legal Group, 3625 S. Town Center Drive, Ste. 150, Las Vegas, Nevada 89135-3017 at ecf@randazza.com.

CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this brief is 12-point Courier New, in compliance with Fla. R. App. P. 9.210(a)(2).

Respectfully submitted,

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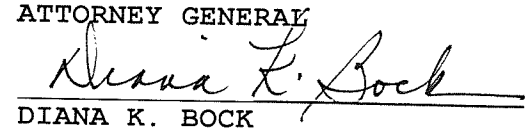

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